

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF SOUTH DAKOTA

3 SOUTHERN DIVISION

4 * * * * *
Civ. 11-4121

5 ARGUS LEADER MEDIA,
6 dba ARGUS LEADER,

7 Plaintiff,

8 -vs-

CLOSING STATEMENTS

9 UNITED STATES DEPARTMENT
10 OF AGRICULTURE,

11 Defendant.

12
13 U.S. District Courthouse
14 Sioux Falls, SD
May 25, 2016

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16 COURT TRIAL
17 TRANSCRIPT OF CLOSING STATEMENTS

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BEFORE: The Honorable Karen E. Schreier
19 U.S. District Court Judge
Sioux Falls, SD

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21 APPEARANCES:

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1 APPEARANCES: (Continued)

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7 -and-

8 Mr. David K. Gaston
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12 -and-

13 Ms. Chu-Yuan Hwang
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* * * * * MAY 25, 2016 * * * * *

(In open court, counsel present, at 3:15 p.m.)

THE COURT: Mr. Gaston, are you ready to proceed?

MR. GASTON: I'm ready. Good afternoon. I would like to thank the Court and counsel for allowing me a moment to make a closing argument on behalf of the United States Government.

Over the last two days we have touched on many issues, but at the core of this trial is a fundamental legal question. Does the information requested by the Argus meet the legal standard for withholding under Exemption 4 of the FOIA? The testimony over the last two days offers a clear answer. Yes.

Exemption 4 of the FOIA asks three things. First, is it commercial or financial information? Plaintiff has stipulated to this already.

Second, that it was received from a person, as defined by law. Even using a simplified understanding of how the USDA records and keeps SNAP redemption data, the requested information from the Argus, one can reasonably conclude this information originates from the retailers, and not the Government.

The third question, is this information confidential? Just last year in the Madel decision,

1 the Eighth Circuit confirmed that a record must be
2 withheld as confidential where release of that record
3 may cause substantial competitive harm.

4 In fact, the Madel decision found substantial
5 competitive harm in a release of submitter data that
6 would reveal, and I listed three, and I quote, "Market
7 shares, inventory levels, and sales trends."

8 THE COURT: So you are only arguing that
9 it's confidential, not that it's privileged?

10 MR. GASTON: I'm arguing that it is
11 privileged, and I'm arguing that it's -- oh, I see
12 what you're asking. I'm focusing my argument on the
13 confidential based on the substantial competitive
14 harm. It's privileged and confidential, I've put
15 together as substantial competitive harm, based on the
16 cases.

17 THE COURT: But what I'm trying to do is
18 narrow it. Are you only arguing that it's
19 confidential?

20 MR. GASTON: Your Honor, may I take a moment
21 to look at the case law to confirm the component that
22 I'm -- I do not want to abandon one component while
23 arguing the other.

24 THE COURT: Sure.

25 MR. GASTON: Thank you. Your Honor, that is

1 correct. We have never argued the privilege.

2 THE COURT: All right.

3 MR. GASTON: I would refer back to the Madel
4 decision. The Madel decision found substantial
5 competitive harm, as I mentioned, in market shares,
6 inventory levels, and sales trends.

7 THE COURT: So many of the cases that I
8 looked at dealing with whether it was confidential
9 dealt with information that the Government had gotten
10 from one party, and whether the release of that
11 information would then impact them, because all of
12 their competitors would have that information about
13 that one party.

14 I didn't see any cases where it was release of
15 information from everybody similarly situated.

16 MR. GASTON: Your Honor, I would argue the
17 Madel decision, even though it only included four
18 particular parties, involved one hundred percent of
19 those parties, and as those parties responded, the
20 case looked at a declaration from a DEA official who
21 considered that information as a statement that they
22 made to the Court.

23 So, in fact, what's interesting about the
24 Madel decision, the affidavits did not come -- excuse
25 me. The declaration did not come from the retailers,

1 but from a Government official herself.

2 What I would like to do to distinguish the
3 cases that you reference is I looked first to the
4 Eighth Circuit, and I looked towards other cases in
5 the D.C. Circuit and others.

6 I would say that each individual retailer who
7 has submitted data, all of them should be considered
8 as individuals, and that competition should be
9 considered as competition that surrounds those
10 individual retailers in each particular instance.

11 I don't think grouping them together
12 eliminates the individual competitive harm that each
13 retailer who has submitted information might receive.

14 THE COURT: So let's talk about some other
15 Government programs.

16 For instance, the Department of Ag pays
17 benefits to individual farmers that are here in
18 South Dakota.

19 MR. GASTON: Yes.

20 THE COURT: And that information is public.

21 MR. GASTON: Your Honor, to my knowledge,
22 not all of that information is public.

23 In fact, under the most recent Farm Bill, and
24 I believe the one before it, a class of information
25 which is known as GIS information, geospatial

1 satellite type information, is explicitly removed from
2 that, because, based on a Department of Agriculture
3 decision, that when that information went out, it was
4 competitively harmful.

5 THE COURT: But I know information has been
6 published in the Argus Leader that listed, for
7 instance, the top 20 people, producers in
8 South Dakota, and how much they received in ag
9 subsidies.

10 MR. GASTON: Right. But those subsidies --

11 THE COURT: And wouldn't that cause some
12 competitive harm to them as compared to other
13 producers?

14 MR. GASTON: I am not an expert on the farm
15 subsidies, the nature of the subsidies that those
16 farms have received. And I am not an expert on what
17 those subsidies might have done to the competitive
18 nature or position of those farms.

19 What I am an expert on is what the information
20 requested by the Argus does, in terms of the
21 competitive nature of that information, in the
22 complete absence of that information in the
23 marketplace by those affected retailers of the
24 information requested.

25 So while I cannot create why I'm not

1 sufficiently informed of the case to which you refer,
2 to the information to which you refer, to create a
3 one-for-one comparison, I can say that a competitive
4 harm element in this particular set of information in
5 this particular matter is clear.

6 THE COURT: So another area I was thinking
7 about are physicians and medical providers, and they
8 get Medicare and Medicaid proceeds. I believe that
9 that information is publicly available.

10 MR. GASTON: Your Honor, I believe I may
11 disagree with you. I believe there was case law on
12 that particular topic, where there was a ruling that
13 went one way, and then it was reversed. I don't have
14 those cases in front of me, so I cannot confirm it.

15 But my understanding is that a Medicare case
16 went the other way, and that Medicare information,
17 sorted by physician, is not available.

18 I can state from my experience. I have
19 physicians in my family, and they were concerned about
20 this issue.

21 So when this issue actually did not end up
22 coming out, as you described, it was viewed as a
23 relief, because this information they, too, viewed as
24 confidential. I believe the case you cite is from
25 Florida.

1 THE COURT: Well, actually what I'm citing
2 is an article that I read in USA TODAY a number of
3 years ago that identified the top 10 people or top 10
4 entities that received Medicaid or Medicare payments
5 and the dollar amounts that they had received.

6 MR. GASTON: Also worth exploring is what
7 exemption that information was held under. For
8 instance, if it was a larger entity, and they were
9 using Exemption 6, rather than Exemption 4, then what
10 you would have in the case would be a situation where
11 the Medicare redemptions would perhaps reveal too much
12 of those individual doctors' information. Right?
13 Rather than what we are talking about here with
14 Exemption 4.

15 So without the case in front of me and without
16 being fully versed in the exact nature of the case you
17 described --

18 THE COURT: I'm telling you it's not a case.
19 It's a newspaper article that I read that listed the
20 names of the providers and the amounts that they
21 received.

22 MR. GASTON: Right. I guess the case that
23 supported the release of the information coming out,
24 as you describe. So I understand the outcome you put
25 forth before me.

1 However, I do not understand the genesis of
2 that information, nor do I understand exactly where
3 that information flows, and those doctors are entities
4 as you describe commerce. Perhaps a hospital has a
5 different sort of argument against the release of
6 information than an individual physician.

7 So you said the top 20 entities. I did not
8 read that article, Your Honor, so I do not know
9 exactly to which you discuss.

10 THE COURT: Okay.

11 MR. GASTON: Now, while Exemption 4 is
12 expressive on the must be withheld, it is silent on
13 how an agency might reach this decision.

14 All that is required, as affirmed by the
15 Eighth Circuit, is that an agency provides affidavits
16 that state with specificity the justification for that
17 decision.

18 The Madel Court found that an agency, if
19 sufficiently informed, can even support this
20 determination on their own.

21 An agency is not charged with the task of
22 soliciting a majority, a plurality, or even an
23 informed minority, though I argue the USDA has
24 achieved all three.

25 The task is for the USDA to support the

1 decision to withhold, not on generalized allegations,
2 but with specific information and without bad faith.
3 If the USDA has met this standard, I believe that this
4 matter can be resolved.

5 I believe the USDA has met this standard.

6 Exemption 4 is also silent on the public
7 policy objective an agency must engage. Significant
8 competitive harm is a question of facts and figures,
9 data and analysis. Withholding decisions by the USDA
10 are based on these factors. Policy, Your Honor, is
11 not part of this process.

12 Your Honor, the defense has offered compelling
13 narratives from a diverse slate of knowledgeable
14 stakeholders who understand their business and their
15 competition.

16 THE COURT: So prior to this case, has USDA
17 ever argued that Exemption 4 precluded the release of
18 this type of information?

19 MR. GASTON: Are we referring to SNAP
20 redemption data 2005 to 2010?

21 THE COURT: Yes. That's the issue before
22 me. Or for any time period. I didn't mean to limit
23 it to this time period.

24 MR. GASTON: The understanding was that
25 under U.S.C. 2 -- I'm sorry, the statute escapes me.

1 Under the statute, the information was not
2 allowed for release, and the belief was also and
3 as promulgated through our own regulations.
4 7 C.F.R. 278.1(q), I believe, is information was not
5 allowed to be released.

6 It was only after the decision by the Eighth
7 Circuit in the Argus Leader Media case in 2000,
8 January 14, I believe that's correct, Your Honor, that
9 we had to begin to start looking at this matter in a
10 different light.

11 We have been understanding that Exemption 3
12 and the law, both 278.1 and 278.1(q), 7 C.F.R.
13 278.1(q), were the statutes and the regulations that
14 sufficiently were being used to keep this information.

15 This is notable, Your Honor, because it was
16 not until a few years ago that the Court and Congress
17 made clear that a statute was -- a withholding statute
18 had to sort of have preamble language within the
19 statute itself.

20 The law that we were using had not been -- it
21 was an old law and had not had that sort of charge
22 language at the beginning of it. So we didn't have
23 the certainty that a statute, if rewritten today,
24 might have.

25 THE COURT: So this is the first time

1 that --

2 MR. GASTON: This is the absolute first time
3 that we've looked at this information under
4 Exemption 4 of the FOIA, because we had felt confident
5 that, until recently, that this information was
6 properly withheld under Exemption 3 of the FOIA.

7 THE COURT: So no other Court has considered
8 the argument that you are making here today with
9 regard to this?

10 MR. GASTON: With regard to this particular
11 data, under this particular exemption, I do not
12 believe that a Court has made.

13 Now, I believe that parallel decisions have
14 been made. As you mentioned, the Medicare case, I
15 would like to take a look before I make that assertion
16 directly in Court.

17 But in terms of SNAP retailer redemption data,
18 no, I do not believe so. Though I will say that there
19 has been protection put forth, for instance, for
20 others towards their information.

21 For instance, if the Argus sought the
22 information on an individual's SNAP redemptions. I
23 use "redemptions" in a careful way here, because I
24 understand it's had different shapes throughout the
25 course of this case. That would not be allowed out

1 the door. But there would be different sorts of
2 redemptions.

3 The only reason I raise that is because this
4 information is understood to have some metrics, some
5 nexus of protection in any form it's had. A lot has
6 been kept at the USDA.

7 THE COURT: So other than Medicare data, is
8 there any other general group of data that would be
9 similar to the SNAP benefits or Medicare payments?

10 MR. GASTON: May I have a moment to confer
11 with counsel?

12 THE COURT: Sure.

13 (Off the record discussion)

14 MR. GASTON: After conferring with counsel,
15 I cannot confirm the response to your question, though
16 I am willing to look it up, and I can offer an answer.

17 THE COURT: Okay.

18 MR. GASTON: I'm sorry. Could you remind me
19 of the question so I made sure that I answered fully?

20 THE COURT: Well, I'm just wondering if
21 there are any other, rather than an individual who is
22 trying to keep information private, if there are
23 groups of people who are all receiving a Government
24 payment; so physicians that are providing Medicare
25 benefits; grocery stores that are getting SNAP

1 benefits; you know, entire classes of people that are
2 getting some type of Federal payment.

3 MR. GASTON: Yes. I don't know that I've
4 seen a distinguishment of an individual and a group,
5 especially when that group is construed of
6 significantly independent individuals.

7 Even though there are trade associations and
8 other sort of groupings, these are individual
9 retailers who compete against each other, even within
10 a trade association, even within an organization or a
11 group.

12 Each one competes against Walmart. Each one
13 competes against their neighbor. Each one competes
14 against, you know, any retailer that we've seen come
15 before the Court.

16 THE COURT: And I understand that you may
17 lump them all together. But I'm trying to find out if
18 there are other large groups of people that together
19 are claiming that it's confidential information.

20 MR. GASTON: Under Exemption 4.

21 THE COURT: Under Exemption 4.

22 MR. GASTON: Again, Exemption 4 is, I think,
23 a new approach for this protecting this information
24 from disclosure, because we had the longstanding
25 understanding that Exemption 3 would be the

1 appropriate way to withhold it.

2 THE COURT: And I'm looking for --

3 MR. GASTON: Not to say that Exemption 4 is
4 inappropriate. I'm only saying that it was sort of
5 the first pass that the statute made clear,
6 Your Honor.

7 THE COURT: Right. And I'm trying to see if
8 there are other groups, like physicians getting
9 Medicare benefits.

10 MR. GASTON: I can look into this,
11 Your Honor.

12 THE COURT: Okay.

13 MR. GASTON: I believe that we cited one of
14 those cases in our brief, but I just don't have them.
15 I'm just not prepared on that particular issue.

16 THE COURT: Okay.

17 MR. GASTON: Yes. So the defense has
18 offered compelling narrative from a diverse slate of
19 knowledgeable stakeholders who understand their
20 business and their competition. All have made clear
21 the nature of the confidential business information
22 the Argus asked the USDA to provide.

23 The Eighth Circuit has found that the FOIA
24 prevents disclosure when disclosure is likely.

25 "Likely," Your Honor, is the standard the

1 Eighth Circuit uses to cause competitive harm.

2 Through testimony today, yesterday, through
3 the USDA RFID analysis, and through other filings with
4 this Court, the USDA has met the standard for
5 withholding under Exemption 4 of the FOIA.

6 Thank you, Your Honor.

7 THE COURT: Thank you. Mr. Arneson?

8 MR. ARNESON: Thank you, Your Honor.

9 Before I begin, maybe I can help clarify the
10 medical question that you had on Medicare payments.

11 I don't have the case in front of me, but in
12 the course of my research in the last few years, I
13 think a couple of years ago what happened was a
14 longstanding injunction in Florida, a District Court
15 in Florida, that had prohibited this Medicare
16 information from being disclosed was lifted.

17 It was lifted, and I'm not going to
18 overstretch myself here, but there had been
19 significant pressure, and the Court, I think, finally
20 said, "Enough of this."

21 Then whoever is in charge of Medicare -- is it
22 HSH? CMS. They changed their policy.

23 So that's probably the article that might have
24 come out. So they do not cover that up anymore. But
25 it wasn't by Court decision, the Court decision.

1 THE COURT: Okay. Well, and it makes sense
2 that it was from Florida, because my recollection of
3 the article was that like the top four or five
4 recipients of payments were all from Florida. They
5 were amounts quite higher than anybody else
6 nationwide.

7 MR. ARNESON: Yes. It's probably not
8 coincidence that the Court decision was in Florida,
9 but also not that Florida is the highest population --

10 THE COURT: That's true, too.

11 MR. ARNESON: -- being my age and older.
12 That's one place I can go to feel young.

13 Anyway, I won't -- I don't want to
14 underestimate the value of the basic legal burdens and
15 presumptions in this case, but I think the Court has
16 read them enough times, that if she reads them one
17 more time, she'll probably hold it against the person
18 who mentions it.

19 But I do need to touch base and say this is
20 FOIA. Transparency is what it's all about. It's what
21 the Government wants. From the President on down, to
22 the lowest level Federal employee, it is the desired
23 effect.

24 And to that end, exemptions, the nine listed,
25 of which we're on No. 4, are to be narrowly construed,

1 and the requester is always to be given the benefit of
2 the doubt, and essentially to fulfill or achieve the
3 purpose of FOIA.

4 So that being said, I think my first and
5 foremost concern in this case, and I think it was
6 pretty clear in my inept presentation, was I was
7 trying to establish, and I think we finally did, that
8 despite flow charts and EBTs and all the rest of it,
9 this is, in fact, a Government program.

10 This is, in fact, a situation, and however you
11 want to cut it, the shorthand version is the
12 Government is paying SNAP retailers, who voluntarily
13 participate in a program to provide food for the
14 people who need it, and those people who are
15 considered to be worthy of our attention because they
16 cannot afford to buy nutritious food for themselves.

17 THE COURT: So do you concede that the
18 information requested is financial, and it's obtained
19 from a person, so the only issue I have to determine
20 is if it's confidential?

21 MR. ARNESON: I'd love to say yes, but I
22 have to say that "obtained from a person" makes it --
23 yes, the original information.

24 I mean the Government is not going to pay
25 retailers out of the clear blue. I mean they're not

1 giving out handouts to the retailers. There has to be
2 something that justifies what they're paying out.

3 I guess my point is, that's not the
4 information we're asking for. Yet there's a reason
5 why the Government is paying it out, but that's what
6 we want to know.

7 We want to know what is the Government paying,
8 taxpayer dollars, to people voluntarily participating
9 in the program?

10 The other side of it, through the EBT process
11 is a matter that facilitates the information, yes,
12 that gets to the Government.

13 But I don't want to confuse the issue by
14 saying it's anything more than what would happen
15 if -- I'll use the example -- Uncle Sam walks into the
16 store with a SNAP recipient and said, "Pick out 12
17 items, and I'll pay for it." I don't think anybody
18 would be arguing that there the Government is
19 obtaining information, critical information that has
20 anything more than completing the closed circuit.

21 That information doesn't have any independent
22 existence outside of the functioning of the retailer
23 in the program itself.

24 It's not the kind of information that you were
25 isolating earlier in your question about people who

1 are maybe wanting to engage in a Government contract.
2 Say the guy who makes helicopters, and he's trying to
3 get the Government contract for that.

4 Let's make it simple. Let's make it the food
5 industry. What if people had to bid, bid or somehow
6 get the Government contract, for a certain
7 neighborhood to participate in SNAP and it wasn't an
8 open-ended thing?

9 Let's just assume that Mr. Ellis is the guy
10 that is going to get the contract for Minnehaha
11 County, and the Government said, "Okay, we're going to
12 give you the contract, but part of the deal here,
13 Mr. Ellis, is we want to know all your future land
14 acquisition intentions." "Okay." He said, "Well, I
15 want this contract, so here it is."

16 Now, that's the kind of information clearly
17 that is coming to Government, obtained from a person,
18 whether it's through a third party or not, and I grant
19 you that that can be through a third party if it
20 pertains to the person supposedly being injured.

21 But that's a whole different equation.

22 THE COURT: Well, those cases are the ones
23 that I was referencing with Mr. Gaston.

24 MR. ARNESON: Yes.

25 THE COURT: It's normally one person trying

1 to get a contract. And if the information is
2 released, his competitors are able to use that against
3 him in future bidding.

4 MR. ARNESON: Quite different from,
5 "Everybody, what are we earning because we decided to
6 participate in the Government program."

7 And, frankly, to take the Mr. Ellis example
8 one step further, I'm not quite sure that anybody
9 would say, "Okay, Mr. Ellis, you had a contract to
10 provide something to the Government, and we're going
11 to pay you for it," I'm not sure that USDA or any
12 other agency would be saying to us, "The amount that
13 Mr. Ellis is making from the Government is a secret."

14 The information going in about his land
15 acquisition intentions perhaps, but I don't think
16 typically if a person enters into a contract with the
17 Government, that what Government pays them is a
18 secret.

19 THE COURT: Because the amount, for
20 instance, if they were successful in the bid
21 competition, whoever got the bid, the amount of that
22 Government contract would be public information.

23 MR. ARNESON: I think it would be.

24 You know, I think the Federal Government
25 doesn't have quite as -- other than FOIA, which is the

1 obvious catch-all.

2 I mean in South Dakota we have certain
3 categories that information is specifically open or
4 closed, and I have not actually found a statute that
5 said "all Government contracts are open," but I kind
6 of assume that we wouldn't be having this same
7 discussion if that were the case.

8 Government program participation, voluntary,
9 it just doesn't fit into Exemption 4. Congressional
10 intent, it doesn't match what they designed
11 Exemption 4 to do.

12 I think the Court hit upon it, because it's
13 not singular. It's not one person against the world
14 or six people against the world.

15 This is going to apply to 320,000 people
16 equally. I'm not claiming that the effects of having
17 that information available is going to have an equal
18 affect on all of them.

19 But let's remember that trade associations are
20 not -- and I think it was pretty clear, when we're
21 talking about Walmart being a member of one of the
22 trade associations, I'm pretty sure that Food Market
23 Institute, when they wrote a declaration in favor of
24 concealment in this case, I doubt they were speaking
25 -- if they were speaking for Walmart, I think

1 everybody would be interested in saying, "Well,
2 Walmart is the one that has been listed in
3 everybody's, the top of everybody's list of the
4 predators."

5 If Walmart is a member of FMI, and FMI is
6 saying, "Yeah, we don't want disclosure," then that
7 kind of takes the wind out of the sails of the idea
8 that the big, bad guy is going to sit back and twiddle
9 his thumbs.

10 Plus, I would point out that I didn't see
11 Walmart responding, commenting to the RFI, saying,
12 "Yeah." I mean they could have gotten some real
13 public good out of saying, "For transparency reasons
14 and for the American taxpayer, who deserves to know
15 where their money is going, yes, let's have at this
16 information," and then take advantage of it.

17 I think the natural instinct of people faced
18 with a prospect or option, if they're given an option
19 of, "Do you want to give me or the world a view of
20 some personal information or something that you
21 consider to be yours, or do you not want to give it,"
22 I don't think most of us are looking for a rational
23 reason to give that information. I think our first
24 instinct is to recoil and say, "I'd rather not."

25 I think that's what we ended up with in the

1 RFI response. We had, and I'm not stretching here to
2 say hundred of thousands of people who didn't care
3 enough to say, "Yeah, that's a problem for me." We
4 ended up with a few more than 80.

5 And those people, I think it was clear,
6 weren't necessarily strongly identified with
7 establishing, or even suggesting, let alone proving,
8 the likelihood of substantial competitive harm.

9 THE COURT: So let me take you in a
10 different direction for a minute.

11 MR. ARNESON: Sure.

12 THE COURT: One of the witnesses made a
13 comment about the fact that when retailers signed up
14 for this program, they assumed that the payments to
15 them would be exempt, and that some of those retailers
16 may not have signed up if they knew it was going to be
17 public information.

18 MR. ARNESON: I think that was Mr. Larkin.

19 THE COURT: Has there been any thought of
20 making the information public, but, for instance, from
21 this point forward, so retailers would have the option
22 to say, "I don't want to participate if it's going to
23 be public"?

24 MR. ARNESON: Nobody has approached me with
25 that offer, and I haven't discussed it with my client.

1 I think, though, that to be -- to try to come
2 up with an honest answer to that right now, I think my
3 approach would be to be consistent with the way I've
4 approached this case the whole time, and that is,
5 "That's unfortunate, but I don't know why my client
6 and why the public, in general, especially with the
7 reason for FOIA in the first place, I don't know why
8 we have to suffer if the Government made a mistake
9 with these people."

10 I don't mean to be too harsh about that, but
11 that really, you know, "We're sorry that it happened
12 that way, but if you don't want to continue, you can
13 get out," that doesn't really fall in, I don't think,
14 to Exemption 4, anyway, because I think Exemption 4 is
15 under the standard of likelihood or likely to cause
16 substantial competitive harm to those supplying the
17 information.

18 That begins with the inquiry: Is there
19 competition? In this case I think it was all agreed
20 from the beginning, well, I don't know how much
21 competition there is for SNAP people, in particular.

22 I agree with the experts and with the people
23 in the field. Grocery business is very competitive.
24 But that means that the harm has to be coming from the
25 competition.

1 What you're suggesting is a harm that
2 potentially is coming from the fact that they were
3 told by an Agency that their information wasn't going
4 to be disclosed, and now it is. So I don't even see
5 that in the equation.

6 However, I'm not saying that I'm going to be
7 so close-minded as to say, if somebody came with some
8 sort of legitimate suggestion, that we wouldn't take
9 it under advisement.

10 But I think getting back to whether this is
11 even an Exemption 4 case, I think it's a very
12 legitimate issue that we bring up, because the case
13 law, and I think Stephanie and I probably are both
14 sick of looking at it, it keeps -- it doesn't answer
15 that question, because it's not, I don't think, it's
16 not something that ever would have ever really
17 deserved to be in the Court system. I don't think
18 this is an Exemption 4 case for participating in a
19 Government program.

20 Now, assuming I have to deal with Exemption 4,
21 and I will answer your question, yes, we have no -- I
22 mean we can't exactly argue this isn't financial or
23 business information.

24 But the "obtained from a person" does continue
25 to bother me, because I don't think -- I mean I think

1 that necessarily goes back to are we talking with a
2 closed circuit? Are we talking an open circuit of the
3 information?

4 Again, using the Ellis example, that's the
5 kind of information that I think Congress was
6 intending -- or the Courts that imposed this. I mean
7 this, as we all know, is case law, case law standard.

8 I think "obtained from a person" came about in
9 a context that was not the back half of a Government
10 program or a Government contract. I think it was
11 intended to be something -- well, I guess it was
12 intended to be something like the Ellis example, where
13 he has to divulge specific information about himself
14 to be doing something that all the rest of the world
15 is not involved in.

16 But, anyway, I don't want to belabor the
17 "obtained from a person," because I think I tend then
18 to get back to using that same -- that same argument
19 sort of predominates in the very first argument that
20 I'm making, that this isn't an Exemption 4 case.

21 So I think, yes, we can jump down to the
22 substantial competitive harm issue. That would be
23 logically the most significant appearing legal
24 standard that we have to deal with.

25 What I would say about it is this. I don't

1 want to minimize what was presented here on behalf of
2 the Government. I also don't want to minimize what
3 the Argus Leader is saying. I think both of them
4 intended to present an accurate reflection of what
5 concerned them.

6 But I never once really got beyond the point,
7 with the Government's evidence, that, yes, there are
8 people who worry about competition. There are people
9 who worry -- and that's a logical thing for a
10 businessman. I mean competition has got to be the
11 No. 1 concern.

12 We also heard from the same people that
13 competition is good for America.

14 I would love to tell this Court that this case
15 could be decided simply on the fact that competition
16 is good for the SNAP Program, which I think it is,
17 because I think competition, if it does lead to lower
18 prices, is going to lead to greater buying power by
19 the SNAP recipients.

20 But that isn't yet the standard. We have to
21 deal with the likelihood of substantial competitive
22 harm.

23 I have not yet seen a definition of "likely"
24 or "substantial" in a Court decision that is any more
25 helpful than the definitions I've been using

1 personally throughout my analysis, weak as that has
2 been, from Merriam-Webster. Nobody has dissuaded me
3 from believing those are legitimate.

4 I don't think I need to tell the Court what
5 those words mean. It's not simply creating a
6 prospect. It's going way beyond that. "Likely" and
7 "substantial." I mean that's defined to be highly
8 probably that there's going to be significant harm.

9 Well, I guess I should go straight to my
10 definitions. I put them in my pretrial submission.

11 "Likely" is defined as "having a high
12 probability of occurring or being true; very
13 probable." This is the Merriam-Webster's Collegiate
14 Dictionary, 10th edition, 1993, another thing that
15 dates me. You don't even want to know how old my
16 Black's Law Dictionary is.

17 "Substantial" is defined as "considerable in
18 quantity; significantly great." That's a pretty high
19 standard.

20 What I heard throughout the last couple of
21 days, and actually quite longer than that, is we're
22 worried about competition. This is information that
23 will probably be used, but it was never really well
24 established how effectively it will be used.

25 Nobody on our end of it -- I mean Dr. Volpe is

1 saying, "I think it's a flexible enough concept that
2 it could be somewhat detrimental; it could be somewhat
3 beneficial."

4 But I don't think there's a definitive answer
5 that this is likely to cause substantial competitive
6 harm, and I think if that were logical, I think the
7 Government would have come to that conclusion a long
8 time ago and dispensed with the RFI. I don't know
9 that they needed to go through the RFI. I guess they
10 can dispute that.

11 But I think the two documents that they used,
12 their own regulation and the executive order, both
13 clearly identify that if you believe in this defense,
14 you don't have to do this Notice stuff.

15 So I'm not really sure why they did, unless it
16 was not intuitively obvious to them that they had a
17 good defense. I don't blame them for wanting to get
18 more expertise, but it seems somewhat indicative that
19 if a party is uncertain, that might reflect upon the
20 logic of the conclusion.

21 And I've always thought it was an illogical
22 conclusion. I'm not so sure that USDA didn't have
23 some doubts about the logic of the conclusion, too,
24 that the release of this information was going to
25 cause the substantial competitive harm, or was likely

1 to, that was necessary to reach that standard.

2 So when they went to the retailers, what did
3 they come back with? Yes, they came back with some
4 people have had legitimate concerns.

5 But the most focused of them all, in my
6 impression, and I think Mr. Hays was very well
7 intentioned and congenial and all of that.

8 But I think obviously, and the way the
9 Government must have agreed with me, in the use of
10 Gwen Forman, and she's speaking for her own store
11 based on her knowledge of her own information, and
12 then extrapolating or suggesting that somebody else
13 will be able to do the same.

14 Well, yes, I understand that Ms. Forman, or
15 anybody in her position, who owns stores or a store
16 can identify what their SNAP sales are and compare it
17 to their overall sales and find a correlation. But
18 how that generates to the point of being helpful or
19 harmful in the big picture, it's pretty nebulous.

20 I'm not saying that it might not add to their
21 competition from whatever that outfit was that she was
22 -- Quik Mart, or something like that.

23 But nobody also said to Cumberland, "Okay, if
24 that's your strategy, to pull back and stay there for
25 a while, because you just closed out in four states."

1 Nobody is forcing them to take that approach.

2 I think she did say that if they decided to
3 change tomorrow, a different approach, and they saw
4 the opportunities, they've got the same access to the
5 same information.

6 So the other thing that I was missing from the
7 testimony was there must be a great, to quote all of
8 our favorite President, "the silent majority." Maybe
9 that was Agnew. I don't know.

10 I never quite got a sense of who was going to
11 be targeted, and what levels they were looking for,
12 and what was going to be too low to be interesting,
13 perhaps too high to be interesting. Nobody actually
14 established, through testimony, what exactly they were
15 expecting to find or would be their line of
16 demarcation if they got this information.

17 My impression is that's because of the
18 300,000, I don't know, roughly let's just say 300,000,
19 maybe it's 280,000 now in the SNAP Program, that when
20 these numbers come out, if they were to, maybe 275,000
21 of them, you don't even blink. You say, "Well, that
22 seems pretty normal."

23 Maybe the 500 that are really, really over the
24 top, maybe they are all trafficking. I think we all
25 have seen enough media reports of that issue to know

1 that there obviously is a great middle-of-the-road
2 group out there that isn't going to be impacted at all
3 one way or the other. I mean nobody is going to
4 target them, I mean even if targeting were the
5 objective here.

6 Again, I'm not suggesting that just because
7 somebody has got good sales volume for SNAP, that they
8 are going to become prey for the predators. That
9 could be exactly the opposite of what happens.

10 Quite honestly, that assumes they have no
11 defenses to fight back. That assumes that these
12 people who come in and prey upon them are going to
13 know exactly what they are doing and how to do it and
14 are going to be successful.

15 Who knows? They may just have totally screwed
16 it up, and they may say, "Whoa, they are really good
17 at what they do. We probably want to regroup here,
18 and, yeah, their SNAP sales are really good. We're
19 not going to take enough to stick around."

20 That's possible. And I have not heard enough
21 to convince me about this being the substantial
22 competitive harm, again, significantly great
23 competitive harm being likely.

24 The only numbers I've really heard, and I did
25 finally hear I think from the last witness who -- and

1 I'm not going to object, but I think he did more than
2 rebut, but that's fine. I want the truth to come out,
3 and if people have opinions, let's hear them.

4 I think the range of SNAP volume that he was
5 talking about went from probably zero, because there
6 are four stores that don't have any SNAP, up to I
7 think he said as high as 50.

8 But what really surprised me and I think got
9 my attention was Miss Forman, and I know this is not
10 information that probably needs to leave this
11 courtroom, but she gave some SNAP data that I thought
12 was shockingly low, an average of I believe
13 1.5 percent of total store sales.

14 MR. GASTON: Objection.

15 MR. ARNESON: If you want me not to mention
16 this, I will.

17 MR. GASTON: I would prefer, sir. It's not
18 a closed courtroom anymore.

19 MR. ARNESON: Okay. A very low number, a
20 very low percentage, I thought, relative to the
21 potential harm.

22 I guess most of the harm, I know that there
23 was some extraneous or tangential harms that were
24 suggested, and it might not all be SNAP business
25 people are after, but the basic idea, I think, was

1 that the good SNAP volume is going to cause other
2 people in the SNAP Program, or not in the SNAP
3 Program, to get into the SNAP Program, move in and try
4 to take that stuff away.

5 I guess Cumberland, which has every one of its
6 stores in the program, and I think seems to be a
7 pretty successful operation. I mean I've actually
8 been in the Northeast, and they've got some nice
9 looking stores.

10 THE COURT: I think she said there were like
11 four stores that are not in SNAP.

12 MR. ARNESON: Okay. That's right. They
13 were the kiosks. Yes.

14 It just strikes me that that's a fairly small
15 amount of business to, first of all, go after, make
16 huge plans over, and I'm not saying that's the exact
17 percentage for all stores. But I think we would need
18 to know a lot more about what those percentages are
19 before we start saying, "Oh, my goodness."

20 And I don't remember if anybody tried to come
21 up with an overall across-the-nation percentage, but
22 all the numbers I heard were pretty low. That means
23 we're generally talking about going after a very small
24 segment of that store's sales, in the first place.

25 I know there's this low margin in the grocery

1 business, but this really minimizes the impact,
2 I think.

3 So I know that this is supposed to be short,
4 and I know that I wasn't even interested in talking.

5 But I think it's really critical that we keep
6 in mind what this, first of all, what kind of case
7 this is, that it is a voluntary participation in a
8 Government program.

9 For that reason, I think, as the Court is
10 aware, I did offer in my pretrial submission the
11 prospect that no -- case law doesn't get developed
12 unless Judges think there's a good reason for it.
13 Otherwise, it's stare decisis, precedent, whatever.

14 But there's a lot of good case law that has
15 been developed, because at some point along the line
16 somebody said, "This set of facts makes sense to
17 create something important here," and I think this is
18 that case.

19 And when it comes to Exemption 4 analysis of
20 cases that are in this context, which is a Government
21 program, somebody voluntarily participating, and the
22 information being requested is nothing more than what
23 they get out of that program, nothing really other
24 than that, quid pro quo, I think the Court, and I'm
25 asking this Court to take it under advisement, at

1 least, should consider there should be a fourth prong
2 to the Exemption 4 test.

3 In my view, this is one aspect of the
4 Exemption 4 test. But this particular Exemption 4
5 test should not only have to be commercial/financial;
6 obtained from a person; likely to cause substantial
7 competitive harm; but if it is likely to cause
8 substantial competitive harm, if that's a "yes," we
9 should still have to balance that against the
10 benefits, potential benefits to the public and the
11 program itself.

12 The key here from Day 1, and it's what got me
13 confused in the first place and probably forced me
14 into going up to St. Paul, and my fault for not being
15 better versed for this Court at that time.

16 But what I cannot wrap my head around then,
17 and I still can't, is why the recipients of the SNAP
18 Program are not priority here. Quite honestly, this
19 distracts us from that mission.

20 And by not taking into consideration the
21 benefit, the competitive harm, even if that's a given,
22 that that could do for the program by perhaps
23 expanding competition, getting more retailers who are
24 not prohibited. Remember, there's an almost free
25 entry into the retailer program. The more

1 competition, generally the better.

2 Yes, there are going to be some that don't
3 survive, and, yes, there may be some areas that might
4 suffer for the competition driving other competition
5 out.

6 The big picture, I think we heard here once,
7 twice, maybe three times, from not my witnesses, but
8 from their witnesses, competition is good for America.
9 If competition is good for America, competition is
10 good for SNAP.

11 For that reason, I would ask the Court to
12 seriously consider, is this an Exemption 4 case, to
13 begin with? If it is, is there really a likelihood of
14 substantial competitive harm? And if that is answered
15 even "yes," take that last step.

16 Now, I have one final --

17 THE COURT: Let me go back to the language
18 of Exemption 4, which says that it has to be
19 information obtained from a person.

20 So I look at Exhibit 201-A where the witness
21 added in the "Government bank" box underneath the EBT
22 processor, with an arrow going from the Government
23 bank up to the EBT processor.

24 I think there was also testimony that money
25 was transferred from the Government bank to the EBT

1 processor's bank.

2 So information went from the Government to the
3 EBT processor and to the EBT processor's bank,
4 indicating that money was transferred on behalf of a
5 retailer vendor number, based on things that had been
6 approved.

7 If the information that you are requesting are
8 the yearly redemption amounts paid to each
9 participating store, isn't that information generated
10 by the Government and transferred out, rather than
11 obtained from a person?

12 MR. ARNESON: Well, I agree with that, and I
13 know that's what the Eighth Circuit said for the
14 purpose of making its decision. But I also understand
15 the Government's -- the USDA's point of view.

16 Yes, I'm asking for what the Government is
17 paying. I'm not asking for what's been obtained. But
18 I do realize their argument was at some point they can
19 create an origin of information that doesn't have to
20 be directly from the SNAP retailer.

21 Now, the fact that it gets into the Government
22 at some point in the chain before the final --

23 THE COURT: Matt is trying to do whatever.
24 There.

25 MR. ARNESON: I had put my exhibit in the

1 car, so I wasn't really clued in.

2 I guess I understand that "obtained from a
3 person" is a fairly liberal concept. I never thought
4 it applied, because I didn't think we were asking for
5 that information. I thought we were asking for the
6 other side of the transaction. But I understood
7 that --

8 THE COURT: Well, it kind of goes back to
9 the argument of when a person bids on a project, and
10 all of the bid information, the information they
11 submit is confidential, and it may impact or cause
12 substantial harm to the competitive position of the
13 person bidding, but the actual amount of the award
14 doesn't fall under an exemption. It would be similar
15 to that argument.

16 MR. ARNESON: Well, that's what I'm -- yes.
17 It's circuitous. I would agree that whether you
18 consider it to be payment or redemption, that's why it
19 gets confusing conceptually.

20 I agree that either way, it's not secret
21 information. I would agree that it's payment
22 information. It's just the process that facilitates
23 the payment.

24 As I said, if it had been you walk into the
25 grocery store, you take what you want, and then the

1 store owner said -- bills Government, sends them a
2 bill. "Yes, Joe, the recipient, came in and took some
3 bread. You owe me 35 cents." And the Government paid
4 it.

5 Yes. I don't think the bill of the 35
6 cents -- well, yeah, it's obtained from Joe, but it's
7 really nothing more than the amount he wants to be
8 paid.

9 That's why when -- yes. I've seen language
10 that when it's suggesting that the amount that a
11 person is being paid is dependent upon the
12 transmission of some ingoing information. I'm saying,
13 yeah, but it's just what you have to do to be paid
14 under the system.

15 I mean it's just as if -- Judge, you provide a
16 service to the United States, and you get paid for it.
17 And I don't think anybody --

18 THE COURT: And it's public. My salary is
19 public.

20 MR. ARNESON: Yes. And I think most of
21 their salaries are public, too.

22 THE COURT: I think they are. All
23 Government employees are.

24 MR. ARNESON: And if I had any, I would let
25 you know it, but I don't. Probably after this case, I

1 probably won't.

2 So I don't have anything more. If you have
3 more questions of me.

4 THE COURT: No. Thank you, Mr. Arneson.

5 MR. ARNESON: Thank you.

6 THE COURT: Mr. Gaston, did you have any
7 rebuttal?

8 MS. BENGFORD: Just a few cases regarding
9 the -- well, I should let Mr. Gaston speak. Sorry.

10 MR. GASTON: Okay. Your Honor, may I stay
11 seated, or would you like me to approach the podium?

12 THE COURT: Either way.

13 MR. GASTON: I will stay here, if it suits
14 the Court.

15 Your Honor, first you asked if information of
16 this sort was kept before. We do have a case on
17 point. We look -- pardon?

18 Oh. Your Honor, I was sort of trying to
19 resuscitate argument earlier that I was not completely
20 informed on, and I focused on that.

21 I think Your Honor is most interested in the
22 "from a person" component. Is that correct?

23 THE COURT: Both that and the confidential
24 component.

25 MR. GASTON: Right. I see.

1 So information contained in a Government
2 generated report is obtained from a person if such
3 information came from a nongovernmental source.

4 There's been a lot of discussion about the EBT
5 system, and if I might offer the Court a short example
6 of how the system works and what's being sought, maybe
7 I could help clarify this system altogether.

8 I'm discussing High Country Citizens Alliance
9 v. Clarke. It is 2005 WL 2453955. At the time of the
10 drafting of this particular document, it was
11 unreported. It was citing Public Citizen Health
12 Research v. National Institutes of Health, which is
13 209 F.Supp.2d 37.

14 So, yes, the Government believes this
15 information, indeed, comes from a person. Yes.

16 Then the second part is that some rates and
17 reformulations information, supplied by a source
18 outside the Government, fall within protections of
19 Exemption 4. The case that we support that with is
20 Public Citizen Health Research Group,
21 209 F.Supp.2d 44, and it cites Judicial Watch,
22 108 F.Supp.2d 28.

23 Here the language we quoted was, "Bank
24 obtained information from the insurance applicants
25 themselves, commercial lenders for the applicant, or a

1 purchaser of the goods at issue. Each of these
2 entities is a person within the meaning of
3 Exemption 4."

4 So, Your Honor, what I believe and what the
5 Government believes is that when it's information that
6 comes from the retailer and it goes to the EBT
7 processor, this is a singular transaction that does
8 not speak towards Government spending at all.

9 What it speaks towards is this data recording,
10 the EBT processor. If you cut the Government out of
11 the entire chain, the information would still flow
12 from the retailer to the EBT processor. The EBT
13 processor then provides an accounting to FNS.

14 If I might use an example, Your Honor. It's
15 much like if you bought dinner for a friend, and when
16 you got the receipt, you get two receipts inside the
17 black envelope.

18 One is the one you sign. That executes the
19 transaction. That tells your bank to pay the vendor.

20 The second one is one that you don't sign.
21 You keep for your notes. Maybe you put it in your
22 personal Quicken. Maybe you keep it in your pocket.
23 Maybe you throw it away.

24 We keep it, and we use it to help enforce and
25 manage the program. That second receipt is what FNS

1 has, and that, Your Honor, is what is in the STARS
2 System. There is no record of actual payment.

3 THE COURT: Yes, but the Government document
4 would be my credit card company paying the other
5 entity. That's my record. It's not the retailer or
6 the grocery store's record. That's my record.

7 MR. GASTON: I'm sorry. Reverting back to
8 the retailer analysis that we're looking at on the
9 page?

10 THE COURT: I'm reverting back to the
11 Government bank putting money in to pay the EBT
12 processor.

13 MR. GASTON: That's -- and the chart shows
14 that. The Government does pay the EBT processor.
15 But --

16 THE COURT: And I'm saying that is the
17 Government record. It's not a record of a person.

18 MR. GASTON: It is a Government -- okay,
19 yes. The money from the Treasury, going to the EBT
20 processor, that is a Government record.

21 THE COURT: Right.

22 MR. GASTON: That's not the records --

23 THE COURT: So then that's what I'm asking.
24 Does that fall under Exemption 4? It was not obtained
25 from a person. It's a record obtained from a

1 Government entity.

2 MR. GASTON: Those particular records,
3 first, those aren't USDA records, so I can't speak to
4 them directly.

5 They do discuss payment, and, in fact, payment
6 information for SNAP, and this is sometimes ignored or
7 forgotten by counsel, is that this information does go
8 out. We do put it for the total volume of the
9 program. We do it by state. We do it by zip code.
10 We even do it by county.

11 The only thing that holds us doing it on the
12 actual individual granular level is our belief that
13 the law prohibits it under competitive harm.

14 We are trying to follow the law, Your Honor.
15 That is the core of this case.

16 THE COURT: Well, I understand that. I'm
17 trying to figure out exactly how the law fits in with
18 this transaction and whether Exemption 4 actually
19 applies, if it's a Government record, rather than
20 something that's obtained from a person.

21 MR. GASTON: I would like to delineate that
22 the information that is being requested in this
23 particular matter is information that's kept -- and I
24 can find the actual FOIA Request. But it's kept in
25 the 2005, 2010 annual redemption data in the STARS

1 System. Right?

2 That is an aggregation and a manipulation of
3 data received from the EBT processor. That is
4 information that comes from the EBT processor to the
5 USDA, which is aggregated by that EBT processor from
6 data received on a daily basis from retailers.

7 That's the entire flow. The payment part, we
8 have nothing to do with.

9 THE COURT: All right. Anything else
10 anybody wanted to add?

11 MR. ARNESON: One thing, and I forgot to,
12 Your Honor.

13 I think, first of all, what's being described
14 here is the Government knows, within its recesses,
15 there is a record which has been acknowledged and
16 admitted in this case throughout, that records, keeps
17 track of the amounts that SNAP retailers get from the
18 Government for their participation. I mean that's
19 clear.

20 And how we want to recast it because it goes
21 through a process, EBTs and credit cards, this bank,
22 that bank, and the other bank, it does not diminish
23 the fact that it is, in fact, what the Court is
24 identifying it to be, a Government payment and a
25 record of a Government payment.

1 The Government has to keep a record of those
2 payments. It's absurd to think that they don't.

3 The other thing I have, Your Honor, and I
4 almost hesitate to bring it up, and it's a sensitive
5 matter, because I'm hoping this Court will make a
6 decision based without limiting itself to the 2005 to
7 2010 information, and might see fit to issue a ruling
8 that could have bearing on past, present, future.

9 But if the Court were to go against us on that
10 issue, I do believe we have to take into very serious
11 consideration what value, and God knows, I don't think
12 in 2011 I thought I would still be here in 2016
13 litigating this case, but what value 2005 to 2010
14 SNAP redemption information or SNAP payment
15 information, however you want to phrase it, what value
16 that could possibly have to people making plans in
17 2016.

18 I think there is case law that has been cited
19 in pretrial submissions and elsewhere that suggest
20 that worst case scenario, and we are not --

21 MR. GASTON: Objection, Your Honor. Outside
22 the evidence.

23 THE COURT: I think I can apply my common
24 sense. So the objection is overruled. You may go
25 ahead.

1 MR. ARNESON: Okay. I didn't mean to stray
2 outside the evidence.

3 THE COURT: Well, he's arguing there wasn't
4 any evidence that the value of 2005 to 2010 data would
5 be minimal at this point.

6 MR. ARNESON: Oh, there was no evidence.

7 THE COURT: And I said I can apply my common
8 sense. So go ahead with your argument.

9 MR. ARNESON: Yes. I think you can apply
10 your common sense, and I think the case law suggests
11 we don't have to prove that six years have passed. I
12 think there are plenty of cases that talk about stale
13 information.

14 Heaven knows, I think in this highly
15 competitive field, making changes everyday that we
16 heard about for the last two days, 2010, 2005, 2007
17 material probably is not going to be dispositive in
18 making decisions for 2016.

19 That's all I wanted to get across. Thank you.

20 THE COURT: So did either side want to
21 supplement your closings with written briefs, or do
22 you want me to rely on your pretrial submissions and
23 the summary judgment motions?

24 MR. ARNESON: I'm comfortable, Your Honor,
25 without. I don't want to write another word on this,

1 but I will.

2 MR. GASTON: A moment, Your Honor.

3 MS. BENGFORD: Your Honor, I do think we
4 will brief at least the "from a person" issue for the
5 Court.

6 THE COURT: All right. How much time do you
7 think you would need?

8 MS. BENGFORD: Would 21 days be okay,
9 Your Honor?

10 THE COURT: Sure, 21 days. Do you want to
11 respond?

12 MR. ARNESON: Yes. I'll reserve the right
13 to respond.

14 THE COURT: 21 days.

15 MR. ARNESON: Are we limiting it to that
16 issue then?

17 THE COURT: I think that's all they wanted
18 to brief. Do you want to brief more than that?

19 MR. ARNESON: I don't.

20 THE COURT: I'll give you 21 days to
21 respond, and then five days for a reply.

22 Anything else anybody wanted to bring up
23 today?

24 MR. ARNESON: No. Thank you for the Court's
25 indulgence.

1 MR. GASTON: No, Your Honor. Thank you.

2 THE COURT: Thank you. I'll get an opinion
3 out as soon as I get your briefs in. We'll be
4 adjourned.

5 (End of proceedings at 4:20 p.m.)
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1 UNITED STATES DISTRICT COURT
2 DISTRICT OF SOUTH DAKOTA :SS CERTIFICATE OF REPORTER
3 SOUTHERN DIVISION

4 I, Jill M. Connelly, Official United States
5 District Court Reporter, Registered Merit Reporter,
6 Certified Realtime Reporter, and Notary Public, hereby
7 certify that the above and foregoing transcript is the
8 true, full, and complete transcript of the
9 above-entitled case, consisting of Pages 1 - 52.

10 I further certify that I am not a relative or
11 employee or attorney or counsel of any of the parties
12 hereto, nor a relative or employee of such attorney or
13 counsel, nor do I have any interest in the outcome or
14 events of the action.

15 IN TESTIMONY WHEREOF, I have hereto set my
16 hand this 27th day of June, 2016.

17 /s/ Jill M. Connelly
18 _____

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